

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010100312

DECISION

Administrative Law Judge (ALJ) Adeniyi A. Ayoade, Office of Administrative Hearings (OAH), State of California, heard this matter in San Francisco, California, on January 25 through 27, and February 1, 2011.

Both Parents represented Student and were present on all hearing days.

Damara Moore, Attorney at Law, represented the San Francisco Unified School District (District). The District's representative and supervisor of District's high school special education programs, Chris Lanier, attended all days of the hearing.

Student filed this due process request (complaint) on October 6, 2010, and amended the complaint on November 4, 2010.¹ On December 3, 2010, OAH vacated all hearing dates because Parents had not participated in a resolution session. On December 22, 2010, the parties participated in a trial setting conference and the matter was continued to January 25, 2011. Oral and documentary evidence was received at the hearing. At the close of the hearing, based on the parties' requests, the record was left open until February 16, 2011, for the submission of the parties' written closing arguments. District submitted its closing brief on February 16, 2011, and the matter was submitted for decision.²

¹ The filing of the amended complaint restarted the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

² To maintain a clear record, District's closing brief has been marked as Exhibit 45. Student did not submit a closing brief.

ISSUES³

1) Did District significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education (FAPE) to Student and therefore denied Student a FAPE when:

- a. District failed to offer Parents the right to record the September 23, 2010 individualized education program (IEP) team meeting;
- b. District failed to have the required attendees at the IEP team meeting; and
- c. District altered documents after the IEP team meeting to make it appear that Ray Cohen had attended the meeting?

2) Did District's IEP dated September 23, 2010, deny Student a FAPE in the least restrictive environment (LRE) when District offered to move Student from a special day class for learning disabled students (SDC-LD)⁴ to a special day class for severely impaired students (SDC-SI) because:

- a. District failed to provide behavioral interventions, specifically an aide in the SDC-LD classroom, prior to its decision to move Student to the SDC-SI classroom;
- b. SDC-SI placement is more restrictive because Student had previously made educational progress in a lesser restrictive placement for learning handicapped students in another school district; and,
- c. District did not have a continuum of placement options available in the LRE?

³ These issues are as framed in the January 12, 2011 Order Following Prehearing Conference, and as further clarified at hearing. The ALJ has reorganized the issues for the purpose of clarity. The reorganized issues set forth herein are consistent with Student's complaint and OAH's November 22, 2010 Order of Determination of Sufficiency.

There were five issues set forth for the due process hearing in the January 12, 2011 Order Following Prehearing Conference. However, during the due process hearing, Parents requested and were granted leave to withdraw Issue Number 4. The issue related to whether District denied Student a FAPE by failing to properly assess Student. .

⁴ The SDC-LD classroom is also referred to as the special day class for learning handicapped students (SDC-LH). Thus, wherever used, SDC-LH and SDC-LD are one and the same.

3) Did District deny Student a FAPE during the 2010-2011 school year (SY) by failing to ensure his safety in his special education placement because Student was subjected to harassment in the SDC-LD classroom?

4) Did District deny Student a FAPE during the 2010-2011 SY by unilaterally changing his placement from a general education physical education class to a Junior Reserve Officers' Training Corps (JROTC) class without parental consent?

PROPOSED REMEDIES

Student requests an order requiring District to provide a behavioral intervention plan, placement in a non-public school (NPS), and an independent psycho-educational assessment paid for by District.

CONTENTIONS OF PARTIES

Student contends that District's IEP offer dated September 23, 2010, denied him a FAPE in the LRE when District proposed to move him from SDC-LD to SDC-SI. Specifically, Student contends that he should have been provided with an aide in the SDC-LD classroom regarding his behavior issues rather than being moved to SDC-SI classroom. Further Student contends District did not consider a continuum of placement options available in the LRE, and that the proposed SDC-SI placement is too restrictive. Student alleges that District failed to ensure his safety in the SDC-LD classroom and unilaterally changed his placement from a physical education class to a JROTC class without parental consent, thus denying him a FAPE during the 2010-2011 SY. Finally, Student alleges that District denied him a FAPE when District failed to offer Parents the right to record the September 23, 2010 IEP team meeting, failed to have the required attendees at the IEP team meeting, and altered documents after the IEP team meeting to make it appear as if Jerome S. Cohen (Ray Cohen)⁵ had attended the meeting as a District administrator.

District contends that its IEP offer of September 23, 2010, was designed to provide some educational benefit to Student in the LRE. More specifically and among others, District denies that it interfered with Parental participation in the IEP development process, and maintains that the IEP was conducted properly and appropriately. It contends that all required attendees were present at the IEP team meeting and that various placement options

⁵ Mr. Cohen has a bachelor's degree in Spanish, and received his master's degree in special education, Level 1 and 2, from the San Francisco State University in 2002. He is a special education classroom teacher at Galileo and teaches algebra (including the modified pre-algebra class) and geometry. He has participated in several IEP team meetings and has experience serving special needs students. Mr. Cohen sometimes acts as the administrator designee, as appropriate, for District.

were considered for Student in compliance with the continuum of placement options requirements.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a 17-year-old male who is eligible for special education and related services as a child with intellectual disability (formerly, mental retardation) and emotional disturbance. At all relevant times Student resided with his Father within the boundaries of District. Prior to his enrolment in District, Student attended Fred Beyer High School (Beyer) within the Modesto City Schools (MCS) where he completed 10th grade.⁶ Due to his disability, and over the years, Student has had academic, social/emotional and behavior challenges.

2. Student was enrolled in District's Galileo High School (Galileo) for the 2010-2011 SY on August 11, 2010, and was in an 11th grade SDC-LD program. Student is currently not attending school having been removed by Parents on September 30, 2010, due to the present placement dispute.

The August 27, 2010 30-Day Interim IEP Team Meeting⁷

3. When a child with an IEP transfers from one school district to another within the same state during the same academic year, the local educational agency (LEA) shall provide a FAPE including services comparable to those described in the previously held IEP for Student, until the LEA adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law. In order to make a FAPE offer to Student, District held the 30-day interim IEP (interim IEP) team meeting on August 27, 2010.

4. On the date of the interim IEP team meeting, District had a copy of Student's last agreed upon and implemented IEP from MCS dated November 9, 2009 (incoming IEP). Parents had presented District with a copy of the incoming IEP during Student's enrolment in District. Even though District timely requested Student's pupil records from MCS, the evidence established that at the time of the interim IEP team meeting, District had not received them. Thus, District had no other records concerning Student, whether those records relate to Student's prior school placement, or his special education services either at MCS or at any other place.

⁶ Student's Mother still resides in Modesto, and while Student was at Galileo, he spent most of his weekends with Mother in Modesto.

⁷ The August 27, 2010 IEP or its offer is not at issue in this case and nothing regarding that IEP is decided in this decision.

5. The incoming IEP document from MCS indicated that Student was eligible for special education and was receiving services. Based on the incoming IEP, Student was receiving “specialized academic instruction,” in a “separate class in public integrated facility,” at Beyer, and was mainstreamed in general education for 13 percent of his day. He was not participating in regular education “core academic classes” and physical education, and his graduation plan was to receive a “certificate of completion” rather than a diploma. The incoming IEP indicated that Student’s behavior did not impede learning, and it did not include a behavior support plan (BSP), behavior intervention plan (BIP), or a behavior goal.

6. Based on Student’s incoming IEP document, the interim IEP team members placed Student in an 11th grade SDC-LD program located at Galileo. As part of the program, Student would participate in seven classes: Piano Beginner, Pre-Algebra, Remedial Reading, Physical Science, Ninth Grade English, JROTC (for his physical education class) and Homeroom. The classes would be held in various classrooms. The SDC-LD program is similar to a general education curriculum, and students in the program are able to receive diplomas, based on modified curriculum. Student received supports and related services, participated in modified curriculum and received accommodations. Goals were included in the interim IEP in the areas of daily living skills, reading comprehension, language arts and writing, and computation, among others. No BSP or BIP was offered and no behavior goal was included in the interim IEP of August 27, 2010.

7. No party has raised any issue regarding the appropriateness of the interim IEP August 27, 2010 offer, or the goals or services contained therein. Therefore, this decision does not address the issue of the appropriateness of the interim IEP of August 27, 2010.

8. Student attended the SDC-LD classes until September 30, 2010, when Parents removed him from school due to a dispute between Parents and District regarding the triennial IEP team’s recommendation that Student’s placement be changed from the SDC-LD classroom to an SDC-SI classroom for the severely impaired students. Since September 30, 2010, Student has not gone back to Galileo or enrolled at any other school.

Events Following the August 27, 2010 Interim IEP Team Meeting

9. Shortly after Student’s placement in the SDC-LD classrooms, there were documented behavior issues involving Student, and Student was involved in a number of behavior incidents in various classes. In fact, Student had at least two disciplinary referrals between August 16 and 19, 2010, for behavior issues and for making inappropriate comments to his teachers and peers.

10. On September 13, 2010, Student got a disciplinary referral from Ms. Wattles, Student’s environmental science class teacher.⁸ In the referral, Ms. Wattles reported that

⁸ Ms. Wattles received her master of arts, special education, Level 1 and 2 mild/moderate credential from the San Francisco State University in 2005, and a bachelor of arts degree in 2000. She is a special education science teacher and has taught special needs

Student was making inappropriate comments, and was calling peers “fruitcake” or “fruity”.⁹ When Ms. Wattles attempted to warn Student, he told her that he did not “give a shit,” and that if anyone touched him he would “knock the shit out of them.” As a result of this incident, Catherine Pringle,¹⁰ the Assistant Principal for Galileo, spoke with Student and Mother, and Student was advised that future occurrences could lead to a suspension.

11. On September 16, 2010, Mr. Samuel Janeway¹¹ reported that Student was observed “speaking inappropriately” to another student in his math (pre-algebra) class. When Mr. Janeway intervened in order to deescalate the situation, Student said “fuck you” to Mr. Janeway, and called him a “fucking asshole.” As a result of the incident, Student got another referral, and was warned and counseled by Ms. Pringle. The referral document indicated that Student has had other incidents and that Student was a safety issue in the SDC-LD classes. Further, on September 29, 2010, Student was reported to be using inappropriate language in Ms. Hennessy’s English classroom, and calling his peers racially derogatory names in Stephen Jackson’s homeroom classroom.

students at Galileo since 2007. Prior to working at Galileo, she was a resource teacher at two of District’s middle schools. She has participated in several IEP team meetings and has experience serving special needs students.

⁹ At the hearing, both Mr. Cohen and Ms. Wattles explained that these are slurs directed at homosexuals.

¹⁰ Ms. Pringle holds master of arts degree in education, special interest concentration, Cross-Cultural Language and Academic Development (CLAD), from the San Francisco State University, and a bachelor of art degree from the New York University. She received her counseling (Pupil Services) credential in 2001, and her administrative credential in 2008. She initially joined the District as a teacher in 1996, and has been an Assistant Principal for Galileo in the past two years. Also, Ms. Pringle has worked at other school districts, including the New York City public school as a counselor and as a special education director.

¹¹ Mr. Janeway received his bachelor of arts degree in English from the Bucknell University, Pennsylvania, in 1992. He received a special education, mild/moderate, learning handicapped specialist clear credential degree in 2005. He holds a Behavior Intervention Case Manager Certification, as well as an Administrative and CLAD credentials. Further, Mr. Janeway is a special education SDC-LD teacher and counselor at Galileo, as well as a High School Content Specialist at District. Prior to teaching at Galileo, Mr. Janeway was a Behavior Specialist for District. He has worked with District since 2000 as an employee, and since 1995, under a contract with District. Due to his various roles, he has experience serving special needs students and has participated in several IEP team meetings.

12. Several witnesses testified for District.^{12 13} Their testimony established that Student was very disruptive in his SDC-LD classes and would often instigate confrontations with peers by making inappropriate statements about his peers' racial background and sexual orientation. Mr. Cohen testified that District staff reported to him about many of Student's "outbursts" and his tendencies to escalate situations. On occasions, he has had to deescalate Student by talking with him, and by having Student participate in District's Wellness Program, which addresses many social issues including crisis management, bullying, gay and lesbian issues. At least once every week, Student would visit Mr. Cohen's office for crisis deescalation and intervention.

13. Based on the progress reports submitted for the week of September 20, 2010, by three of Student's teachers, Mr. Janeway, Ms. Wattles and Ms. Sara Carter, Student was noted to be disruptive in his SDC-LD classes 80 to 100 percent of the time, never completed his homework or class work, and had problems staying on task, following directions, or using appropriate language.

14. Academically, Student was noted to be unable to work independently, and was often not doing his work. Based on Student's report card dated October 1, 2010, Student obtained the following grades in his seven SDC-LD classes: Piano Beginner (C-), Pre-Algebra (F), Remedial Reading (D), Physical Science (F), Ninth Grade English (D), and JROTC (B). Homeroom was not graded.

15. Student did not dispute or present any evidence to rebut District's assertion that he was making little or no progress in the SDC-LD program. Parties also agree that the behavior issues in the SDC-LD classes were not under control. The evidence failed to show that Student was making any meaningful social/emotional or academic gains in his SDC-LD classes prior to the September 2010 IEP team meeting. Further, neither party disputes the

¹² These witnesses include Ms. Wattles, Jerome Ray Cohen, Stephen Jackson, Steven Hardee, Nancy Lambert, Mr. Janeway, Joan Wlodaver, Maureen Brown, Ms. Pringle, Jennifer Roffle and Mr. Lanier. Even though Student also listed Mr. Jackson, Mr. Hardee, Mr. Janeway, Ms. Brown, and Ms. Pringle as witnesses, all essentially testified in support of District's contentions. Ms. Roffle is District's Educational Placement Counselor, and was involved in the initial enrolment of Student in District on August 11, 2010.

¹³ No issue has been raised regarding the professional qualifications, education or experience of the witnesses, or any of District's staff. Nonetheless, as discussed herein, the evidence established that each has requisite qualifications, education, background and experience as relevant to the provision of special education services and supports to Student. Further, and unless as specifically noted or explained in this decision, at all relevant times, each is found to have requisite knowledge and experience regarding the issues or subjects to which they testified. Each of Student's teachers has relevant credentials and educational background, and all were qualified to teach and serve Student. Resumes were submitted and accepted as exhibits for Dr. Selph and most of District's staff that testified at the hearing.

fact that the curriculum at the SDC-LD program was too advanced for Student, even with modification. At the hearing, Father credibly testified that when he first met with District's personnel on August 13, 2010, during Student's enrolment in District, he expressed an apprehension about Student's program and placement to District personnel, "because of the level of class and schedule" in the SDC-LD program.

16. The evidence established that Student was not making any significant progress in the SDC-LD program, and that he struggled socially, behaviorally or academically in his SDC-LD classes. Student had problems making friends in the SDC-LD program. Further, the evidence shows that Student often talked inappropriately, and would incite and instigate peers by making derogatory remarks and calling peers racially and sexually inappropriate names. District staff believes that Student's safety issues in the SDC-LD program were mainly due to his low adaptive living skills and behavior issues, and his academic challenges due to his inability to access the SDC-LD curriculum.

17. However, while both parties believe that the SDC-LD placement may not be appropriate for Student, Parents contend that the lack of academic, behavior and/or social progress in the SDC-LD classes could be addressed by providing Student with a one-on-one aide in the SDC-LD program.

The September 23, 2010 Triennial IEP Meeting

18. The IEP team meeting was held on September 23, 2010. Both Parents and Student attended. Also, at Student/Parents' invitation, Dr. Danielle Carlin, M.D., a psychiatrist, and Dr. Brac Selph,¹⁴ a clinical psychologist who had been providing psychological and counseling services to Student for a little over a year, attended. For the District, Stephen Hardee, the ROTC general education teacher; Maureen Brown, the school psychologist; Ms. Wlodaver, a special education/SDC-SI teacher;¹⁵ Ms. Wattles, a special education teacher; and Mr. Janeway, a special education teacher attended. Further, Mr.

¹⁴ Dr. Selph is a Licensed Clinical Psychologist and the Assistant Clinical Professor, Young Adult and Family Center of the Department of Psychiatry, University of California, San Francisco.

¹⁵ Ms. Wlodaver received a master's degree in education of exceptional children from the San Francisco State University in 1978, and a bachelor's degree in education from the Boston University in 1974. She has several credentials, including Multiple Subjects, Severely Handicapped, Resource Specialist and Learning Handicapped credentials. She joined the District in 1977, and had taught special needs students, including those with intellectual and learning disabilities. She has experience teaching academic subjects in community-based setting. She teaches social skills, independent living skills, and functional life skills in the community, and appropriate behavior models, among others, in her SDC-SI classroom. She has experience serving special needs students and has participated in several IEP team meeting including Student's.

Jackson, the SDC-LD special education teacher and Student's case manager; and Ms. Lambert attended. Ms. Lambert is the Assistant Principal of Pupil Services (Assistant Principal) of Galileo, and she attended, as District's administrator.¹⁶

Student's Unique Needs Related to His Disability

19. The evidence established that as of September 2010, Student's disability was impacting his ability to benefit from his SDC-LD placement, and that he was making little or no meaningful academic or social/emotional progress in his SDC-LD class. Further, and even though assessment is not at issue in this hearing, as a way of providing relevant background for its September 23, 2010 IEP offer, District established that it conducted a comprehensive psycho-educational assessment of Student on September 1 and 15, 2010. The assessment involved many domains, including tests of academic achievement, cognitive ability, auditory perceptual skills, visual-motor integration skills, auditory processing skills, as well as behavior. Student record review, observations and interviews were also conducted.¹⁷

20. The results of District's assessments of Student indicated that Student's academic achievement functioning was in the range of a first to third grade student in the areas of reading, writing and math. His cognitive scores were in the low range, and sensory perception, visual motor integration and memory scores were below average. His adaptive living skills were below average and his social and emotional scores showed clinically significant deficits in several areas. Overall, Student's scores on the Behavior Assessment for Children (BASC) administered on Student by District, appear to corroborate his behavior in the SDC-LD classes as observed, and as documented in Student's past pupil records, some dating back to 2004. The BASC showed that Student has trouble staying seated, disrupts others, seeks attention, argues when denied his way, and has tendencies to tease and threaten, among others. No issue has been raised regarding the qualifications of the assessors, or the appropriateness of the assessments, whether procedurally or substantively.

21. The assessment report, dated September 1 and 15, 2010, was presented at the September 23, 2010 IEP team meeting. Thus, District established that it had relevant and necessary information regarding Student's disability and unique needs at the time of the September 23, 2010 IEP team meeting.

¹⁶ Ms. Lambert received her bachelor of arts degree in English from the University of California (UC), Santa Barbara in 2000, a master's degree in education from the San Francisco State University in 2002 and a master's degree in educational administration from the UC Berkeley in 2007. She has a professional clear single subject credential in English, and administrative services credentials, Tiers 1 and 2. She has been the Assistant Principal of Galileo since 2007.

¹⁷ At the time of the assessment, District had not received Student's pupil records from MCS.

22. An IEP is an educational plan that must address all of a student's unique educational needs, including the student's academic, social, emotional, communicative, physical, and vocational needs. In order to provide a FAPE, the IEP must also be reasonably calculated to provide the student with some educational benefit.

23. Based on the testimonies of Student's teachers, including Ms. Wattles and Ms. Wlodaver, District established that the SDC-LD classes' curriculum was above Student's level, and established that Student's social and behavior issues are directly related to Student's inability to access the curriculum. Also, Parents had expressed concerns regarding Student's ability to access the curriculum in the SDC-LD classes, and were concerned about Student's escalating social and behavioral issues in the SDC-LD placement.

24. Based on Student's records, assessment results, Student's low academic functioning, and his escalating behavior in the SDC-LD program, District members of the IEP team believed that Student could not benefit from a large group instructional setting like the one offered in the SDC-LD program.¹⁸ Therefore, the team concluded that in order to meet Student's educational needs, a small group instructional setting is required. Ms. Brown¹⁹ was persuasive that Student's behavior was better in his smaller classes, based on her observation of Student.

25. The District members of the IEP team offered Student placement in the SDC-SI classroom/program, which is for severely impaired students. The SDC-SI classroom offers a smaller classroom setting, with a higher adult-to-student ratio. The SDC-SI program has four adults (three aides and a teacher), and only 11 students. According to the SDC-SI teacher, Ms. Wlodaver, some of the students in the program are mainstreamed into various general education classes and the SDC-SI class often has about eight students working with the four adults. Students in the SDC-SI program have similar academic, social/emotional and behavior challenges as Student, and District established that Student would be able to better access the curriculum in the SDC-SI "self-contained" classroom, and would make meaningful educational progress.

¹⁸ The exact numbers of students in the SDC-LD program varies from class to class. Some have up to 14 students, and only two adults (a teacher and a class aide) are present in most of the classes.

¹⁹ Ms. Brown holds a master's degree in business administration (1994) from the San Francisco State University, a bachelor's degree in east asian studies (1986) from UC Berkeley and a master's degree in psychology (2004). She holds a pupil services (administrative) credential. She has worked as a school psychologist within the District for approximately six years, and has experience conducting assessments, and providing services and supports to special needs students. She has also participated in several IEP team meetings.

26. Regarding its September 23, 2010 IEP offer and the appropriateness of SDC-SI placement for Student, District's witnesses persuasively established that the SDC-SI proposed placement is an appropriate program based on Student's disability and needs. In the SDC-SI placement, Student would receive related services and support, including curriculum modification, accommodation, a BSP and transportation, among others. He would participate in transition services and receive services during the extended school year (ESY). Further, Student would be mainstreamed in the general education environment for 33 percent of his time. The IEP team would continue to monitor Student's progress and make appropriate placement adjustments as necessary, based on Student's performance and success in the SDC-SI classroom.

27. The evidence established that at the September 23, 2010 IEP team meeting, Parents and their two invitees, Dr. Carlin and Dr. Selph, were not prevented from suggesting or requesting any changes to Student's IEP. They neither requested any changes or placement in a non-public school (NPS). District established that NPS placement for Student was not discussed because no one believed it was appropriate for him. After the September 23, 2010 IEP team meeting, Parents agreed to take to the IEP document home in order to consider the placement. Since then, Parents have expressed their disagreement with the proposed change in placement and have refused to consent to the IEP.

28. Parents disagree with the proposed SDC-SI placement because they believe that the SDC-SI program would hurt Student's self esteem because Student felt that the other students in the SDC-SI classroom are not like him. Parents believe that the skills taught in the classroom are below Student's ability. The evidence established that Student currently possesses a number of functional and daily living skills and abilities. He is able to ride a bus, use the internet, use a debit card to make purchases, make sandwiches, go out of the house on his own, and go to the beach and visit stores. Therefore, Father testified that Student had demonstrated ability to manage himself in a "better setting" than the setting offered in the SDC-SI classroom.

29. Even though Student and Father testified that Student has acquired a number of functional and daily living skills, Student failed to establish that he has mastered all these skills, or that the SDC-SI classroom has nothing more to offer him by way of educational benefit. The evidence established that Parents are concerned about Student's ability to ride the bus safely. For example, within days of Student beginning school at Galileo, Parents requested that the interim IEP be held by District in order to obtain door-to-door transportation for Student because Parents were concerned about his safety. Further, several of District's witnesses testified that Student's adaptive skills and social skills are very low, and therefore, he would benefit from the wide range of skills that are taught in the SDC-SI classroom. Mr. Janeway credibly testified that he once found Student lost at a transit station.²⁰

²⁰ Even though Student denied being lost when Mr. Janeway saw him, both Dr. Selph and Father testified that Student would lie to gain an advantage "when talking about a

30. Parents admitted not spending any significant amount of time observing the SDC-SI classroom or program, and thus were unable to present any evidence regarding any part or component of the SDC-SI program that they believe is not appropriate. Further, Dr. Selph, Student's witness, admitted that he merely "poked" his head in the SDC-SI classroom, and that he too does not have any knowledge or adequate basis to evaluate the SDC-SI program. Therefore, other than the labeling issue relating to the SDC-SI classroom, Student presented no persuasive evidence to demonstrate how and why the SDC-SI classroom or program would be inappropriate for him. On the contrary, several of District witnesses established that the SDC-SI program would provide Student with educational benefit. Further, Student's psychiatrist, Dr. Selph, admitted that the social skills, independent living skills and the community living skills components of the placement would benefit Student.

31. Student failed to meet his burden to establish that the offer of placement in the SDC-SI constituted a denial of a FAPE because the placement could not meet his needs or provide him with educational benefit. As found above, Student failed to establish that he had mastered any or all of the above-enumerated skills, that the list represents the extent of the skills taught in the SDC-SI classroom, or that the SDC-SI program would not have provided him education benefit. The SDC-SI focuses on focuses on behavior, social skills, functional academics, independent living skills, community living skills, and basic writing, among others, which are areas of need for Student. Learning skills in these areas would provide Student with a FAPE. Further, Student offered no evidence to establish that learning these skills are unnecessary or that he would not have received some educational benefit in the SDC-SI program. Therefore, the evidence shows that District's September 23, 2010 IEP offer, and the SDC-SI placement is calculated to provide Student with meaningful educational benefit.

Procedural Issues Raised by Student Regarding the September 23, 2010 IEP Team Meeting

Failure to Offer Parents the Right to Record the September 23, 2010 IEP Team Meeting

32. On September 16, 2010, District sent a notice of a triennial IEP team meeting to Parents for the September 23, 2010 IEP team meeting. The notice advised Parents that they could use an audiotape recorder during the IEP team meeting to record the meeting, and required Parents to provide District with notice if they intended to record the meeting. However, when Parents returned the form they did not indicate that they would like to record the IEP team meeting. Student failed to establish that Parents were not offered the right to record the triennial IEP team meeting of September 23, 2010. On the contrary, District established that Parents were offered the right, or notified of their right, to record the IEP team meeting through the Meeting Confirmation Form.

difficult subject" or "when he wants to give an impression that everything is okay," among other described motives. Therefore, on this issue, Student is not found credible.

33. At the hearing, Parents admitted that they did not make a request to record the IEP team meeting, either through the Meeting Confirmation Form, through a verbal request at the IEP team meeting or at any other time.

Failure to Have the Required Attendees at the IEP Team Meeting

34. A school district is required to have in attendance at every IEP meeting certain individuals, including the parents, at least one regular education teacher of the student if the student may be participating in the regular education environment, at least one special education teacher, or where appropriate, at least one special education provider of the child. Further, a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum must attend. Lastly, an individual who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise regarding the student, and the student whenever appropriate, are required to participate.

35. Student based this issue on the September 16, 2010 notice of the IEP team meeting, which District mailed to Parents. The notice provided that Stephen Jackson (Special Education Teacher), Jerome S. Cohen (Administrator), Catherine Pringle (Administrator), Maureen Brown (School Psychologist), and Stephen Hardee (General Education Teacher) would be participating in the IEP team meeting. On September 18, 2010, Parents notified District in writing, through the Meeting Confirmation Form, that they would attend the IEP meeting. In the Meeting Confirmation Form that Parents returned to District, they indicated that they would not agree to “excuse the IEP team member noted on the invitation to the IEP team meeting.” Even though Parents never excused the participation of Mr. Cohen and Ms. Pringle, both did not attend the IEP team meeting.

36. District established that even though Mr. Cohen and Ms. Pringle were to attend the IEP as administrators, Ms. Lambert and Mr. Jackson who attended in their places had requisite knowledge and experience to participate as District representatives and administrators. At the hearing, Ms. Pringle and Ms. Lambert credibly testified that Mr. Jackson²¹ has relevant training and knowledge regarding District’s various programs and placement options and that he was capable of acting as a District administrator at an IEP meeting. Further, Ms. Lambert has similar background and experience as Ms. Pringle, as both are assistant school principals. Ms. Lambert demonstrated that she has the requisite

²¹ Mr. Jackson holds a master of arts, learning and instruction degree from the San Francisco State University, and a bachelor of arts degree in philosophy from the Colorado College. He holds a California license to teach moderate-to-severe students. Mr. Jackson has been with the District since 2006, and teaches District’s SDC students at Galileo. He has also worked as resource specialist at Galileo. He has participated in several IEPs, and has experience serving special needs students.

knowledge, authority, qualification and experience, and that she was capable of fulfilling the role of an administrator at Student's triennial IEP team meeting of September 23, 2010.

37. The evidence failed to establish that District did not have its administrator or representative at the September 23, 2010 triennial IEP team meeting. In fact, and to the contrary, the evidence established that two District's representatives, Ms. Lambert and Mr. Jackson, attended the IEP team meeting. Both were capable of representing District, and each was able to fulfill the role of a District's administrator at the IEP team meeting. Both were knowledgeable about the availability of educational resources within District, both were qualified to provide or supervise the provision of special education services, and both were knowledgeable about the general education curriculum within District. Therefore, other than making the allegation of a procedural violation of FAPE, Student presented no evidence, and the evidence failed to show that the absences of Mr. Cohen and Ms. Pringle at the September 23, 2010 had any impact on the design of the IEP offer, programs, support or services offered to him. Therefore, Student failed to meet his burden on this issue, as he failed to establish that all required attendees were not at the triennial IEP team meeting. Therefore, no procedural violation was established on this basis.

Whether District Altered Documents After the September 23, 2010 IEP Team Meeting

38. Student failed to establish that District altered documents after the IEP team meeting to make it appear that Ray Cohen had attended the meeting. In fact, Student provided no evidence in support of this issue. This issue is based on a "signing error" on page 16 of the September 23, 2010 IEP document. At the hearing, Mr. Janeway, who attended the IEP team meeting, credibly explained that he began to sign the IEP document on a wrong signature line. The line he was signing on was reserved for Jerome Cohen. When Mr. Janeway realized the error prior to completing the signing, he crossed out his partial signature and initialed that area of the IEP document where he was signing in error. As no signature line was reserved for Mr. Janeway in the IEP document, he drew a separate line at the bottom of the IEP document where he consequently affixed his signature.

39. Mr. Cohen credibly testified that he was not at the IEP team meeting and that he did not make the mark at issue. Student presented no evidence to rebut the testimony of Mr. Janeway or Mr. Cohen. Both are found credible, and thus, Student failed to meet his burden on this issue.

Substantive Issues as to the September 2010 IEP Offer

Failure to Offer One-to-One Aide Services in the SDC-LD Classroom

40. Student alleges that the September 23, 2010 IEP offer denied him a FAPE because District failed to provide him behavioral interventions, specifically an aide in the SDC-LD classroom, prior to District's decision to move him.

41. The evidence established that Student has many needs, which are not met appropriately in the SDC-LD program including academic, social/emotional and behavior, among others. He had problems making friends, and was unable to maintain peer-to-peer relationships. At the hearing, Father credibly testified that when he first obtained the SDC-LD class schedule for Student back in August 2010, he also felt that the program, especially the pre-algebra class, was too advanced for Student. Father expressed Parents' concerns to District's staff. However, while Parents and District both believe that the SDC-LD placement is not appropriate for Student, Student has nonetheless argued that he should be left in the SDC-LD program, and provided with an aide regarding his behavior needs. Student failed to explain how his other needs, including academic, social/ emotional and behavior, among others, would be met in the SDC-LD program, even with a one-on-one aide.²²

42. On the contrary, District offered credible evidence to show that Student's academic, social and behavior needs could be addressed in the SDC-SI proposed placement with its whole-class intervention approach. The September 23, 2010 IEP contains a BSP and behavior goals. The evidence failed to show that a one-on-one aide is required in the SDC-SI proposed placement. District demonstrated that such one-on-one aide is not required in the SDC-SI classroom, due to the structure of the classroom, the higher adult-to-student ratio and the whole-class intervention approach used in the classroom.

43. Through its many witnesses, District established that there are more resources available in the SDC-SI classroom for Student's academic and behavior needs than in the current SDC-LD program. Mr. Cohen believes that the SDC-SI placement would "put Student's behavior in check" and learning will occur. He credibly explained that a one-on-one aide in the SDC-LD classes would not have helped to make the placement appropriate for Student, due to his many issues including access to curriculum and low social and adaptive living skills. In the SDC-SI program, Student would receive a higher level of individual attention because of the higher adult-to-student ratio.

44. Ms. Wlodaver, the SDC-SI teacher, testified that SDC-SI classroom would provide Student with educational benefit because Student's unique needs are similar to the needs of some of her students in the SDC-SI program based on functional academic abilities, functional social and behavior similarities and his overall assessment scores. She believes

²² Further, District established that it had no knowledge or a basis to believe that Student has any behavior issues requiring a behavior intervention prior to the completion of its assessment of Student, or as of the date of its interim placement offer on August 27, 2010. Student's incoming IEP from the MCS, which the evidence showed was the only document District had on the date of the interim IEP, indicated that Student did not need a behavior support plan or services, as his "behavior did not impede learning." Therefore, District did not have any reason to believe that Student required behavior intervention or services at the time of the interim IEP team meeting and Student's placement in the SDC-LD program. Student did not request a one-on-one aide or behavior intervention and/or services at the interim IEP meeting of August 27, 2010.

Student's academic and social needs could be met in the SDC-SI classroom. Ms. Brown, the school psychologist, and Dr. Selph agree that the community-based learning, social and behavioral components of the SDC-SI placement are appropriate for Student and that Student would benefit from the classroom.

45. Dr. Selph explained that Student's cognitive challenges interfere with his ability to relate with other people, thus it is important that Student is "surrounded with people like him," functionally and socially. He believes that Student is in need of more structure, and "a comprehensive living plan." Regarding the components of District's September 23, 2010 IEP offer, Dr. Selph testified that placement in a classroom that fosters Student's independent living skills, ability to navigate the community, and which offers supplemental services at Student's level would be appropriate for Student. He believes counseling is beneficial, and that the JROTC is also beneficial to Student. According to Dr. Selph, Student's demonstration of his living skills fluctuates. Student's skills are better when he is doing well, but when he is stressed, his independent living skills could present some challenges.

46. Therefore, Student failed to establish that he could make educational progress in the SDC-LD program, even if provided with a BSP and/or a one-on-one aide for his behavior needs in his SDC-LD classes. The evidence failed to establish how a one-on-one aide would address issues relating to his many needs, including access to the curriculum, social and behavior issues, and problem with peers in the SDC-LD program. Therefore, the evidence failed to support a finding that Student was denied a FAPE because of District's failure to provide him one-to-one aide services in the SDC-LD classroom.

Least Restrictive Environment

47. A special education student must be educated with non-disabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The determination of whether a particular placement is the "least restrictive environment" for a student involves an analysis of four factors, including: 1) the educational benefits to the child of placement full-time in a regular class; 2) the non-academic benefits to the child of such placement; 3) the effect the disabled child will have on the teacher and children in the regular class; and 4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

48. Student contends that District's triennial IEP denied him a FAPE in the LRE because the SDC-SI placement was more restrictive because he had previously made educational progress in a lesser restrictive placement.

49. Based on Student's disability and needs, no party has argued, and none has presented any evidence in support of a proposition that Student should be placed in a full-time regular education program, or regarding the benefit of such placement to Student, the

effect of such placement on teachers and other students, or the cost of educating Student. Therefore, the issue in this case is essentially whether District's SDC-SI placement is more restrictive than Student's current SDC-LD placement, or other possible placements where Student could receive a FAPE.

50. Student offered no evidence to show that the SDC-SI classroom is more restrictive than the SDC-LD placement, or than any other desired placement by Parents. In fact, the evidence established that both placements the SDC-SI and the SDC-LD placements are special day class placements, and are both equal in their level of restrictiveness, when it comes to the question of how much access Student would have to typically developing peers. Both placements are on a public day school campus and both would permit Student equal or similar interaction with his general education peers during 33 percent of his school day. Thus the evidence failed to show that there is an issue of LRE regarding the two SDCs.

51. Regarding District's offer of SDC-SI placement however, the evidence established the SDC-SI placement is appropriate for Student, in that most of the students in SDC-SI classroom are similar to Student academically, and that most have similarly low adaptive living skills scores and social/emotional and behavior challenges just like Student. Further, the evidence established that Student's social/emotional, academic, behavior and safety needs, among others, could be met in the SDC-SI program, rather than the SDC-LD program, and Student would have access to appropriate and typically developing peers.

52. Therefore, even if Student has been able to argue successfully that the SDC-SI placement is more restrictive than the SDC-LD placement, Student has failed to establish that the SDC-LD placement is appropriate for him, or that he could receive a meaningful educational benefit from it. On the contrary, through its many witnesses, District demonstrated that the SDC-LD placement is not appropriate for Student, because as discussed in Factual Findings 12 through 16, Student failed to make educational progress in the SDC-LD placement.

53. The evidence further established that, rather than in the SDC-LD placement, Student's academic, social and behavior, as well as safety issues could be addressed in the SDC-SI classes due to less structure, more transition and above-level curriculum of the SDC-LD program. As found above, Ms. Brown and other District's staff established that, even if a one-on-one aide in the SDC-SI classes could control and monitor Student's behavior, other issues regarding frequent transition, the curricular challenges, and Student's social interaction and peer issues, among others, would remain un-addressed. Therefore, the evidence established that the SDC-SI program is the least restrictive placement for Student given his disability and needs, where he could receive meaningful educational benefit.

54. Regarding the question of whether Student had "made educational progress in a lesser restrictive placement for learning handicapped students in another school district," or at a NPS placement, Student presented no evidence to show that he had greater access to typically developing peers while at MCS or at the Sierra Vista Children Center (Sierra Vista), an NPS, where Student was placed during the 2006-2007 and 2007-2008 elementary

school years. That is, while Student presented report cards covering the periods he was placed at both MCS and October 26, 2009 through June 3, 2010, which showed that he received “B” grades in most of his six classes while at Beyer, he presented no testimony regarding the contents, composition or components of his educational program or his classes at Beyer and/or MCS. No evidence was presented regarding how much access he had to typically developing peers, and further no evidence was presented regarding how less or more restrictive such educational program at Beyer was, or how the SDC-LD or SDC-SI program may be more or less restrictive.

55. Lastly, Student contends, on the one hand, that an SDC-SI program on a public day school campus is too restrictive for him, yet on the other hand, seems to be requesting a NPS placement. Placement in an NPS would result in removal to a more restrictive environment without opportunities for mainstreaming with typically developing peers. This obvious contradiction was not explained by Student given the fact that a NPS placement is more restrictive than the SDC, *albeit*, for students with more severe disabilities, in a public school setting.

56. Thus, Student failed to show that his needs could be met in any other placement or setting, whether in the Parents’ preferred SDC-LD program, or in a NPS. Other than asking for an NPS placement, Student failed to identify any other program, placement or services that would be less restrictive in meeting Student’s needs giving his disability. The evidence does not support a finding that the SDC-LD placement, and for that matter an NPS placement, is less restrictive than the offered SDC-SI classroom. Therefore, Student did not meet his burden on this issue.

Continuum of Placement Options

57. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. Thus, a school district must ensure that a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, is available to meet the needs of children with disabilities for special education and related services. The IEP team must consider possible placements from this continuum within which a student could receive a FAPE.

58. Student contends that District’s IEP dated September 23, 2010, denied him a FAPE in the LRE because District did not have a continuum of placement options available in the least restrictive environment. Specifically, Student alleges that he had made progress at his prior placement in the MCS and at Sierra Vista. Student presented no persuasive evidence on this issue at hearing.

59. District presented evidence to show that, at the September 23, 2010 IEP, the IEP team members considered placement options for Student including the SDC-LD and SDC-SI program, general education classes including PE and JROTC. They also considered

a hybrid class schedule for Student, wherein he would receive instructions from both the SDC-LD and SDC-SI programs. NPS placement was not considered because no one requested it, and no member of the IEP team thought it was appropriate for Student. Mr. Lanier,²³ supervisor of District's high school special education program, testified that he is familiar with District's entire continuum of educational programs, including special services and supports. He credibly testified that the continuum is available in the District and was available to Student. According to Mr. Lanier, the District considered all placement options that could have offered Student a FAPE to determine the least restrictive environment in which Student could receive a FAPE.

60. Therefore, Student failed to establish that District did not have a continuum of placement options available in the least restrictive environment, or that it did not consider such options in making its placement offer to Student.

Bullying and Harassment Issues

61. Student contends that District denied him a FAPE during the 2010-2011 SY in that the District failed to ensure his safety in his special education placement, because Student was subjected to harassment in the SDC-LD classroom.

62. Student based this issue on an incident, which happened on September 29, 2010, in Ms. Liam Hennessy's modern world literature (English) class. On that day, during the class session, Student was involved in an incident wherein another student took scissors and cut Student's cell phone "ear bud" or headphone cord. Another student put the cord in a water bottle. It is unclear whether this happened after the cord was cut or prior to. Student was reported to be very upset and was crying and screaming. Several of District's staff intervened, and a teacher took Student to an office in order for him to calm down.

63. The background circumstances regarding the cause of the September 29, 2010 incident were unclear. However, District's incident report showed that four students, including Student, were involved in the September 29, 2010 incident, and Student was designated as the "victim." Student and his peers were reported to have called each other racially and sexually inappropriate names, but it is unclear whether the name-calling was prior to or after the incident.

²³ Mr. Lanier graduated from the Columbia College with a bachelor's degree. He holds mild/moderate clear credential (Levels 1 and 2), and a supplementary certificate in resource specialist program and special education. He is a behavior specialist and District's Special Education Program Specialist, and oversees all of District's special education programs. Prior to his current position, he was a teacher in the District's SDC-LH special education program. Since 1996, Mr. Lanier has taught special needs student in and out of the District. He has experience serving special needs students and has participated in several IEP team meetings.

64. Other than the September 29, 2010 incident, Student did not report he was “bullied” or “victimized” at any other time. Further, Student has not alleged or presented any evidence to show that the September 29, 2010 acts by the other students were intended to harass, threaten, or intimidate him, or that the incident is pervasive or a typical occurrence. Further, the evidence did not show that an intimidating or hostile educational environment resulted for Student as a result of the September 29, 2010 incident.²⁴

65. On the contrary, District demonstrated that it had an anti-bullying policy in place, and that bullying is addressed and discouraged either through direct intervention, or through its Wellness Program, which is open to all students. The evidence established that the September 29, 2010 incident was an isolated incident and District responded and took necessary action. Mr. Cohen called security and all of the students involved were immediately separated. All of the other students were counseled and the two students that victimized Student were each suspended for one day. Further, two District’s staff members met with Student including, Mr. Jackson, a counselor and Student’s case manager, and Ms. Pringle, the Assistant Principal.

66. Therefore, the evidence failed to support Student’s assertion that he was denied a FAPE because District failed to ensure his safety in his special education placement in that he was subjected to harassment in the SDC-LD classroom. Accordingly, no violation of the law was established.

Change of Student’s Placement from PE Class to a JROTC Class

67. Student contends that District denied him a FAPE during the 2010-2011 SY by unilaterally changing his placement from a general education physical education class to a general education JROTC class without parental consent. The evidence failed to support this assertion.

68. Student began school at Galileo within District on August 16, 2010. As part of his subjects/courses for the SDC-LD program, Student was placed in a general education physical education (PE) class. On August 19, 2010, District changed Student's placement from general education PE to JROTC. The JROTC class teacher, Mr. Hardee and Mr. Cohen established that Father was promptly and immediately advised on the same day the change was made. However, no IEP was developed in conjunction with the change in placement,

²⁴ Pursuant to Education Code Sections 32261 and 48900.4 "bullying" has occurred when a pupil or group of pupils intentionally engage in harassment, threats, or intimidation, directed against another pupil or pupils, such that the intentional harassment, threats, or intimidation “is sufficiently severe or pervasive” to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.

and no IEP team meeting was held. Student contends that this change was a procedural violation under the IDEA.

69. The evidence did not establish that Student's placement in a general education PE class was designed to supplement his special education placement and services, or that it was based upon any of his special education needs. Further, Student presented no evidence to show that PE was intended to address any of his unique needs or special education goals. Student did not establish that the general education PE provided him with any benefit related to his special education needs, or that PE was required in order to provide him a FAPE. Both the PE class and JROTC class were general education classes that did not change the percentage of time Student participated in special education programs and classes.

70. At the hearing, Parent testified that he had nothing against JROTC, and in fact believes that the JROTC is beneficial to Student and Student "enjoyed it very much." However, Father testified that Student "had not earned it," and that he would have preferred to be consulted prior to District allowing Student's participation in JROTC on August 19, 2010.

71. Therefore, because Student's general education PE placement was not part of, or based upon his special education placement, Student failed to establish that the change in placement violated his procedural rights under the IDEA.

72. Moreover, on August 27, 2010, the parties developed an interim IEP that documented Student's placement in JROTC. Parent consented to the interim IEP. Therefore, even if the six-day change in placement from general education P.E. to a general education JROTC class was a procedural violation of the IDEA, it was cured by Parent's consent to the interim IEP. Accordingly, even if a procedural violation of the IDEA had occurred, Student failed to establish how six days in JROTC without an IEP documenting the placement resulted in a substantive denial of a FAPE to him.

LEGAL CONCLUSIONS

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The Student filed the request for due process, and therefore has the burden of persuasion in this matter.

Elements of a FAPE

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as appropriate special education, and related services,

that are available to the pupil at no cost to the parent or guardian, that meet the state's educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) "Special education" is defined as specially designed instruction, at no cost to the parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

3. In *Board of Education v. Rowley* (1982) 458 U.S. 176, 198 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

5. To determine whether the school district offered the student a FAPE, the tribunal must focus on the appropriateness of the placement offered by the district and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at p. 1149, quoting *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. When a child with an IEP transfers school districts within the same state during the same academic year, the LEA shall provide a FAPE including services *comparable* to those described in the previously held IEP, until the LEA adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law. (20 U.S.C. §§1414(d)(2)(C)(i)(I).) California requires that when a child transfers school districts not in the same local plan, that a local program administrator must ensure that an interim placement be provided immediately to the child for a period not to exceed 30-days that is *in conformity* with the child's previous IEP. (Ed. Code §56325,

subd. (a).) The interim placement IEP may be “either the pupil’s existing [IEP], implemented to the extent possible within existing resources, which may be implemented without complying with subdivision (a) of Section 56321, or a new [IEP], developed pursuant to Section 56321.” (Ed. Code §56325, subd. (a).) “Before the expiration of the 30-day period, the interim placement shall be reviewed by the [IEP] team and a final recommendation shall be made by the team in accordance with the requirements of this chapter. The team may utilize information, records, and reports from the school district or county program from which the pupil transferred.” (Ed. Code §56325, subd. (b).)

Continuum of Program Options and Least Restrictive Environment

7. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360.) School districts are required to ensure that a variety of potential educational placements are available to special education students, including placements in general education classes, special day classes, and resource classes at district schools, and placement at certified non-public schools if appropriate. There is no requirement that every possible program option available in a school district be addressed at an IEP meeting.

8. Federal and State law requires school districts to offer a program in the least restrictive environment for each special education student. (See 34 C.F.R. §§ 300.114, et. seq. (2006).) A special education student must be educated with non-disabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006).) A placement must foster maximum interaction between disabled students and their non-disabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)

9. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that the IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

Parent's' Right to Meaningful Participation in the Decision-Making Process

10. Student has alleged a procedural violation of his Parents right to meaningful participation in the decision-making process. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

11. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement or related services. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

Required Attendees at an IEP Team Meeting

12. The IDEA and California education law require certain individuals to be in attendance at every IEP meeting. In particular, the IEP team must include:

- (A) the parents of the child with a disability;
- (B) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment;
- (C) not less than one special education teacher, or where appropriate, not less than one special education provider of the child;
- (D) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum;

- (E) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above;
- (F) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (G) whenever appropriate, the child with a disability.

(20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b).)

Resolution of the Issues

Did District significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student and therefore denied him a FAPE when District failed to offer Parents the right to record the September 23, 2010 IEP team meeting?

13. Pursuant to Legal Conclusions 10 through 12 and Factual Findings 32 and 33, Student failed to meet his burden on this issue. On the contrary, the evidence established that Parents were notified, through District notice of the IEP that they could record the IEP, and Parents neither indicated nor requested that they would like to do so. Therefore, District did not violate Parents' right to meaningful participation in the decision-making process at the September 2010 IEP meeting and thus, did not deny Student a FAPE on this ground.

Did District significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student and therefore denied Student a FAPE when District failed to have the required attendees at the IEP team meeting?

14. Pursuant to Legal Conclusions 10 through 12 and Factual Findings 34 through 37, Student failed to establish that all required attendees were not at the triennial IEP team meeting. The evidence established that even though the two administrators listed on the notice did not attend, two other individuals attended in their places. Student did not offer any evidence to show that the non-attending administrators had any special knowledge, background, training or skills about Student or his disability, which the two individuals that attended did not have. In fact, District presented evidence to show that Ms. Lambert who attended had the same qualification, background and experience as Ms. Pringle, and was able to fulfill the role of an administrator at the IEP.

15. Further, the evidence established that Ms. Jackson, who attended the meeting, was also trained and was capable of serving as a District administrator. Therefore, other than this allegation of a procedural violation, which is not established in this hearing, the evidence failed to establish that the failure to attend the September 23, 2010 IEP team meeting by these listed administrators, had any impact on the resultant IEP offer. Therefore, Student

failed to meet his burden on this issue. District did not violate Parents' right to meaningfully participate in the decision-making process at the September 2010 IEP meeting and Student was not denied a FAPE on this basis.

Did District significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student and therefore denied Student a FAPE when District altered documents after the IEP team meeting to make it appear that Ray Cohen had attended the meeting?

16. Pursuant to Legal Conclusions 10 through 12 and Factual Findings 38 and 39, Student failed to establish that District altered the IEP documents after the IEP team meeting in order to make it appear that Ray Cohen had attended the IEP meeting. The evidence established that the crossed-out and incomplete signature mark that is on the IEP document, which is at issue in this hearing, was as a result of an error. The mark was neither intended nor purposeful, and the evidence failed to establish that any of District's staff or personnel altered or falsified, or intended to alter or falsify the September 23, 2010 IEP document. District has not contended that Mr. Cohen was not present at the IEP team meeting and no proof was presented to show otherwise. Therefore, Student failed to establish that District violated Parents' right to meaningful participation in the decision-making process at the September 2010 IEP meeting. Therefore, District did not deny Student a FAPE on this ground

17. Therefore, pursuant to Legal Conclusions 10 through 12 and Factual Findings 32 through 39, District did not violate Parents' right to meaningfully participation in the decision-making process at the September 2010 IEP meeting, and as such Student was not denied a FAPE on procedural grounds.

Did District's IEP dated September 23, 2010 deny Student a FAPE when District offered to move Student from the SDC-LD class to the SDC-SI class because District failed to provide behavioral interventions specifically an aide in the SDC-LD classroom prior to the decision to move Student to the SDC-SI classroom?

18. Pursuant to Legal Conclusions 2 through 9 and Factual Findings 40 through 46, Student failed to establish that he could make educational progress in the SDC-LD program if provided with a BSP and/or a one-on-one aide for his behavior needs in his SDC-LD classes. Further, Student also failed to establish how a one-on-one aide would address issues relating to his many needs, including access to the curriculum, social and behavior issues, and problem with peers in the SDC-SI program. On the contrary, District established that Student's academic, social and behavior needs are better addressed in the SDC-SI proposed placement with its whole-class intervention approach.

19. Therefore, Student failed to meet his burden to show that District denied him a FAPE when District decided to move him from the SDC-LD class to the SDC-SI class without providing him behavioral interventions specifically an aide in the SDC-LD classroom. The evidence established that District provided Student with a FAPE at all

relevant time considered in this decision, and based on the evidence, District's triennial IEP offer of September 23, 2010, for the 2010-2011 SY and 2011 ESY, is found to be reasonably calculated to provide Student with meaningful educational benefit.

Did District's IEP dated September 23, 2010 deny Student a FAPE in the LRE when District offered to move Student to the SDC-SI class, because the SDC-SI placement is more restrictive than the SDC-LD class, and because Student had previously made educational progress in a lesser restrictive placement for learning handicapped students in another school district?

20. Pursuant to Legal Conclusions 2 through 9 and Factual Findings 47 through 56, Student failed to meet his burden on this issue. As noted in Legal Conclusion 7 through 9, an analysis of the least restrict environment must consider four factors: (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

21. During the 2009-2010 SY, Student attended Beyer High School within the Modesto City Schools, and was placed in a self-contained special education classroom due to his disability with only 13 percent mainstreaming opportunity. Prior, Student was at a non-public school where Student's entire education consisted of 100 percent time in a special education environment. The District's offer was for Student to spend 67 percent of his school day in the special education environment, and Student would have 33 percent mainstreaming opportunity. This is the same amount of mainstreaming time Student had in the SDC-LD placement. Thus, the evidence failed to establish that the SDC-SI is more restrictive, either in comparison to Student's prior placement at MCS, or in the SDC-LD program.

22. The SDC-SI classroom offered smaller class setting, and it is more inclusive than the Parents' preferred NPS placement, which Student contends that District did not consider. In developing its offer, the District considered Student's needs based on the assessment and all available information, and decided that Student required more intensive help that could be best provided in a SDC-SI special education classroom. The District properly determined that Student's needs in academics, social/emotional and behavior could be appropriately met with the more intense and individualized assistance Student could receive in the SDC-SI classroom. Therefore, a NPS placement was not considered.

23. Therefore, applying the four-part least restrictive environment analysis, Student could not make adequate educational progress in a full-time, regular education setting. The evidence showed that Student required intensive services with a specially trained teacher and smaller class size, which District offered in the SDC-SI special education classroom. Regarding the second part of the analysis, the District could work with Student in

the SDC-SI special education setting on academics, social skills and behavior needs, and his apparent need to better interact with his typically developing peers.

24. Further, District's offer allowed Student to transition from an 87 percent special education environment at Beyer to a more inclusive setting in the SDC-SI classroom, and to a smaller classroom setting than the SDC-LD placement. As to the third part of the analysis, based on comments from several District's staff, Student's learning and behavior difficulties was causing him to be disruptive in classes when he gets frustrated because he does not understand what is being taught. He was not learning and his behavior issues were not under control. Regarding the final element in the analysis, neither party introduced evidence regarding the cost to the District to educate Student in the regular education or special education setting. A weighing of the four factors favors the District's offer because of Student's need for intensive instruction in a special education setting to meet his unique needs. Further, District's offer permits Student to spend more time (33 percent) of his school day in inclusion regular education program.

25. Therefore, Student failed to establish that the SDC-SI placement is more restrictive than the SDC-LD class, or than any other placement where Student could receive meaningful educational benefit. Further, the evidence failed to establish that Student had made educational progress in a lesser restrictive placement than either the SDC-LD or the SDC-SI placement. On the contrary, the evidence established that District's IEP offer of September 23, 2010 is intended to provide Student with some meaningful educational benefit, and it would have provided Student with a FAPE in the LRE. Therefore, the IEP offer did not deny Student a FAPE in the LRE.

Did District's IEP dated September 23, 2010 deny Student a FAPE in the LRE when District offered to move Student to the SDC-SI class because District did not have a continuum of placement options available in the least restrictive environment?

26. Pursuant to Legal Conclusions 2 through 9 and Factual Findings 57 through 60, Student failed to meet his burden on this issue. While Student offered no evidence persuasive on this issue, District established that it properly considered the "continuum of program options" in developing its IEP offer by reviewing the various placement options that existed for Student to meet his needs. Additionally, the District's offer is in the least restrictive environment because Student required intensive intervention for his behavior, social/emotional, as well as academic needs in a smaller class setting. Student did not establish, and the evidence failed to show that he would have made educational progress in a lesser restrictive setting than the one District offered in the SDC-SI classroom. Therefore, District's offer of 67 percent special education and 33 percent general education best met the needs of Student in the least restrictive environment.

Did District deny Student a FAPE during the 2010-2011 SY by failing to ensure his safety in his special education placement because Student was subjected to harassment in the SDC-LD classroom?

27. Pursuant to Legal Conclusions 2 through 9 and Factual Findings 61 through 66, Student failed to meet his burden on this issue, and thus failed to establish that District failed to ensure his safety, or that he was subjected to harassment in the SDC-LD classes. On the contrary, District demonstrated that it has an anti-bullying policy, and that it specifically, and systematically addresses bullying through its Wellness Program.

28. In this one isolated September 29, 2010 incident, where Student was identified as the victim, rather than acquiescing or “failing to ensure his safety,” District took action to ensure Student and his peers’ safety. The evidence showed that three of District’s staff intervened, and all of the students were separated. Student was escorted to an office, while the other three students were taken to the Dean’s office. As a result of the incident, the students involved were counseled regarding inappropriate use of language, and two of the three students who picked on Student were suspended.

29. The evidence failed to show that the September 29, 2010 incident is typical or that it is a common occurrence and Student has not alleged or presented any evidence to support a finding that he was victimized or “bullied” on any other occasion. Therefore, the evidence failed to support a finding that District denied Student a FAPE by failing to ensure his safety in the SDC-LD classroom.

Did District deny Student a FAPE during the 2010-2011 SY by unilaterally changing his placement from a general education PE class to a JROTC class without parental consent?

30. Student failed to meet his burden on this issue. Pursuant to Legal Conclusions 2 through 9 and Factual Findings 67 through 72, Student failed to establish that District denied him a FAPE during the 2010-2011 SY by unilaterally changing his placement from a general education physical education class to a general education JROTC class without parental consent. The evidence shows that the JROTC was part of his interim IEP, which Parents consented to. Further, Student failed to establish that PE was intended to address any of his unique needs, or special education purpose or goals. He did not establish that the general education P.E. provided him with any benefit related to his special education needs or was required in order to provide a FAPE, which was not equally provided by placement in JROTC.

31. Therefore, based on the totality of the evidence, Student did not prevail on any issue. Pursuant to Legal Conclusions 2 through 12, and Factual Findings 32 through 72, the evidence established that District’s IEP offer of September 23, 2010, for the 2010-2011 SY and 2011 ESY, is reasonably calculated to provide Student with a meaningful educational benefit, and the IEP offer did not deny Student a FAPE in the LRE.

ORDER

All of Student's requests are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: March 29, 2011

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings